No. 75-1499

In the Supreme Court of the United States

OCTOBER TERM, 1975

JAMES BUSSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals rendered no opinion. The opinion of the district court (Pet. App. 1a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a) was entered on February 4, 1976. The petition for a writ of certiorari was filed on April 14, 1976, and is therefore out of time under Rule 22(2) of the Rules of this Court.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]On March 5, 1976, petitioner filed in the court of appeals a "petition for rehearing *en banc*," which was denied on March 17, 1976. Although a timely petition for rehearing in the court of appeals suspends the finality of the judgment and therefore

QUESTIONS PRESENTED

1. Whether acquittal by the jury on a count charging petitioner with unlawful interception of communications automatically invalidates convictions on counts charging him with knowing and wilful disclosure of the illegally intercepted communications.

2. Whether the district court should have given a more explicit instruction concerning *scienter*.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of four counts of wilfully disclosing the contents of communications which he knew, or should have known, had been obtained through an unlawful wire interception, in violation of 18 U.S.C. 2511(1)(c). He was acquitted of one count of illegal wire interceptions, a violation of 18 U.S.C. 2511(1)(a).[2] Petitioner was fined $500 and sentenced on one count to five years' imprisonment, to be suspended in favor of probation after 30 days had been served. Sentence on the remaining three counts was suspended. The court of appeals affirmed without opinion.

The evidence established that petitioner played tapes of private telephone conversations between Margaret Sue Geddie and others to her business associates.

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tolls the time in which to seek certiorari, a suggestion of rehearing *en banc* "shall not affect the finality of the judgment of the court of appeals" (Fed. R. App. P. 35(c)) and therefore does not toll the time in which to seek certiorari. Cf. *Department of Banking* v. *Pink*, 317 U.S. 264, 266; *Market Street Ry.* v. *Railroad Commission*, 324 U.S. 548, 551-552.

[2]Petitioner also was acquitted of nine other counts of wilful disclosure.

In November 1973 Geddie terminated a close personal relationship which she had maintained with petitioner for about a year. Petitioner refused to accept her decision not to see him and threatened to force her to leave the city where she worked and lived (Tr. 221-222, 300). On July 14, 1974, petitioner telephoned Geddie and played for her a portion of a tape recording containing a conversation she had had a week earlier with a business associate (Tr. 222, 225, 227). Petitioner followed up this call with a series of telephone calls; when Geddie continued to hang up on him, petitioner told her that he had taped her telephone conversations. He said that he thought other people would be interested in hearing the tape; he named four such persons (Tr. 225-226).

Petitioner carried out his threat and played tapes of Geddie's private telephone conversations to three of her business associates and her employer (Pet. 3-4).[3] Each disclosure was the basis of a separate count of the indictment.

ARGUMENT

1. Petitioner contends that his convictions for disclosing the contents of the wire communications are inconsistent with his acquittal for intercepting the communications, and that the convictions therefore should be reversed.

Although it was the government's theory at trial that petitioner personally had intercepted the conversations,

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[3]Nine other people received tapes; none could testify who had made or sent them.

its evidence that he had done so was not compelling;[4] the jury's verdict that the government had not proven beyond a reasonable doubt that petitioner intercepted the conversations is not inconsistent with its verdict that petitioner had disclosed the conversations knowing that they had been illegally intercepted.

In any event, even if the verdicts were inconsistent, that would not affect the validity of petitioner's convictions. *Dunn* v. *United States*, 284 U.S. 390, 393-394; *Hamling* v. *United States*, 418 U.S. 87, 101.[5]

2. Petitioner contends that the trial court should have instructed the jury more specifically that the government had to prove beyond a reasonable doubt that petitioner knew or had reason to know that the conversations had been obtained through illegal wiretapping (Pet. 10-14). However, read as a whole (*United States* v. *Park*, 421 U.S. 658, 674), the instructions adequately informed the jury of the burden of proof.

The court instructed the jury that the government must prove "every essential element of * * * guilt beyond a reasonable doubt" (Tr. 396). It read Count 2 of the indictment (which, it explained, was the same as Counts 3 through 14 except as to the party to whom the disclosures had been made) which charged (Tr. 400; emphasis added):

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[4]Petitioner told Geddie he had taped the conversations, not that he personally had wiretapped her telephone line (Tr. 225-226).

[5]Petitioner's argument (Pet. 8-10) that *In re Winship*, 397 U.S. 358, and *Ashe* v. *Swenson*, 397 U.S. 436, undercut *Dunn* is fallacious. The rationale for the rule permitting inconsistent verdicts is not that jurors are irrational, but that they may convict on some counts but not others because of compassion or compromise. The Court recognized this in *Hamling*, which was decided after *Winship* and *Ashe*.

> the defendant * * * willfully did disclose and endeavor to disclose to Sanford Sunday, the contents of wire communications, which contents had been obtained through the interception of wire communications in violation of Title 18 of the Code, * * * *as the defendant * * * then knew and had reason to know* * * *.

A copy of the indictment, which repeated in each count this language on *scienter*, was used by the jury in its deliberations (Tr. 422). The court also read to the jury the applicable statute (Tr. 407; emphasis added):

> Any person who willfully discloses or endeavors to disclose to any other person the contents of any wire or oral communication *knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection shall be guilty* * * *.

The jury was further instructed (Tr. 411):

> As for the first element that interception and disclosure must be willful as is charged in the indictment, an act is done willfully if done voluntarily and intentionally and with a specific intent to do something that the law forbids.

The court stressed that the jury had to find specific intent to violate the law. In addition, both defense counsel (Tr. 382) and the prosecutor (Tr. 389) discussed with the jury the question whether the evidence demonstrated petitioner's knowledge that the conversations had been obtained and disclosed in violation of federal law. There is no reason to believe that the jurors did not understand that petitioner was guilty only if he disclosed the communications "knowing or having reason to know" that they had been obtained in violation of law.[6] See *United*

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[6]The sufficiency of the evidence of petitioner's knowledge is not challenged.

States v. *Billingsley*, 474 F.2d 63, 65 (C.A. 6); *United States* v. *Malfi*, 264 F.2d 147, 151 (C.A. 3).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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